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No. 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

On Appeal from the Supreme Court of Ohio

THE YOUNGSTOWN SHEET AND TUBE COMPANY,
Appellant,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,
Appellee.

REPLY BRIEF FOR APPELLANT

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I

PACKAGED AND BULK FUNGIBLES MUST BE ACCORDED THE SAME TAX IMMUNITY.

The test established in *Brown v. Maryland,* 12 Wheat., 419, (1827), and in every case down to the most recent, *Hooven & Allison v. Evatt,* 324 U. S. 652 (1945), is both clear and certain in its application, and it makes no provision for the exceptions which the tax commissioner and the Ohio Court seek to assert. The test protects imports stored in the same form as imported, whether in packages or in bulk, so long as they are in storage and not acted upon for the purpose of their importation, i. e. either sale or manufacture.

The tax commissioner's argument contrary to the above rule merely follows the lead of the Ohio Supreme Court which held that the removal of a part of the imports shipment for eventual use, or the storing of one identical imports shipment with another destroys the shipment's immunity. Where shipments of goods are imported in packages, the decisions of this Court have never held or implied that the remaining packages of a shipment lose their immunity from local taxation simply because one or more packages are removed from the original shipment or shipments and used or sold, or because different shipments of packages are stored with each other, and there is no fair or logical basis for applying a different rule to bulk fungibles. The Constitution by its terms protects all imports, and it protects them to the same extent, and it follows, therefore, that bulk fungibles cannot, in any proper construction of those terms, lose their constitutional immunity from tax any sooner than do packaged goods.

In other import cases reviewed by this Court, various different shipments were stored in the same place and with each other. That certainly was true in *Hooven & Allison, supra.* But in no instance has the Court permitted a tax while the import was still in storage and not acted upon for its intended purpose, either sale or manufacture.

The commissioner also contends that imports are taxable if they are stored at the place of use, a test which has never had acceptance from this or any other Court. In any event, such a situation is not present in this case, since the stipulation shows (R. 34, 35, 36, 37 and 38) that the imported ores here in issue are not stored at the place of use, and therefore the commissioner's argument on this point is without meaning.

The commissioner further contends that fungibles imported for use in manufacturing must "bear their fair

share of the tax". As pointed out above, however, the Ohio Court's decision would subject fungibles to a greater tax burden than that borne by packaged goods imported for sale. If the commissioner had really wanted tax equality he would have abided by the decision of the Ohio Board of Tax Appeals, which did treat fungibles and packaged imports equally.

II

THE CASES CITED IN THE TAX COMMISSIONER'S BRIEF ARE NOT APPLICABLE.

Several cases are cited by the commissioner in the last few pages of his brief, the first of which is *May v. New Orleans,* 178 U. S. 496 (1900). That case does not hold that each entire shipment of fungibles is a package, or that each entire shipment of packaged goods is a package. It merely holds that the breaking of one package for use renders the contents of that particular package subject to tax. There is no language in the opinion holding or even suggesting that the breaking of one such package renders taxable the remaining original packages of a single shipment. It was the breaking of the original package with which the Court was concerned, and not the status of the remaining unbroken original packages constituting a part of a shipment.

The two cases cited by the commissioner on page 10 of his brief, *Washington Chocolate Company v. King County,* 21 Wash. 2d, 630, 152 P. 2d, 981 (1944); and *Southern Pacific Company v. City of Calexico,* 288 F., 634 (1923), hardly support the commissioner's position, since both cases vigorously defend the rule of *Brown v. Maryland, supra,* that imported goods are protected from taxation so long as they remain in storage and are not sold or used for the purpose for which they were imported.

The last two authorities discussed in the commissioner's brief are *Stanton v. Los Angeles County*, 177 P. 2d, 804 (1947); and *Mexican Petroleum Corporation v. City of South Portland*, 121 Me., 128, 115 A. 900 (1922). Although these cases hold that the entire shipment is the package, it suffices to say that they are directly opposed to the decisions of this Court and the rule established by those decisions, and they have never been followed by any other court. As a matter of fact, the commissioner has failed to point out that four cases* have been decided in which the courts, on identical facts, have reached an opposite conclusion from that reached in the *City of South Portland* case.

But far more surprising than the commissioner's failure to refer to the relevant state court decisions is his failure to refer to the *Hooven* case. It is possible, perhaps probable, that this Court will dispose of the appeal herein without reference to the *Stanton* case or the *City of South Portland* case, but it is inconceivable that this Court could rule on the question presented without reference to the *Hooven* case. As we have pointed out in our main brief, we believe that the *Hooven* case is controlling for the instant case, and we can only conclude from the commissioner's failure to refer to the *Hooven* case that he fears that may be true. The commissioner's failure to cite *Hooven* is further evidence that this proceeding is merely his attempt to re-argue that case.

Discussion of the equal protection part of this case will be found in appellant's reply brief filed in the companion

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**Mexican Petroleum Corporation v. The Borough of Roosevelt*, Supreme Court of New Jersey, unreported (1919);
City of Galveston v. Mexican Petroleum Corp., 15 F. 2d 208 (District Court, S. D. Texas (1926);
Mexican Petroleum Corp. v. Louisiana Tax Commissioner, 173 La. 604, 138 So. 117 (1931);
Re: Taxes Pacific Guano & Fertilizer Co., 321 Hawaii 431 (1932)*

case, *Allied Stores of Ohio, Inc. v. Bowers* (Case No. 10).

Appellant submits in conclusion that its iron ores are imports and therefore protected from state taxation by the United States Constitution.

Respectfully submitted,

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